acquiesced in their tearing up the agreement? What was the proper inference the court should have drawn from his conduct? Should not he, as a reasonable man, have taken action within a reasonable time after a breach of contract by the other party, unless he in fact acquiesced in its rescission? In my opinion a lapse of over four years — between June 8, 1962 and August 29, 1966 — is not even within measurable distance of the reasonable time he needed to make up his mind. His conduct therefore compels me to conclude that he accepted the rescission. Having so agreed I cannot see how he is entitled even to damages, much less specific performance.

Here the purchaser had been solely responsible for a most inordinate delay. No satisfactory explanation had been given to account for it. Such delay had in fact resulted in benefits which were entirely one-sided. He had in the meantime the profitable use of his money, the whole sum of $160,000, which should have earned interest amounting to $38,400 in 4 years at 6 per cent if reckoned to the date of the writ, and approximately $67,200 when judgment was finally delivered in the action. This not inconsiderable sum was lost to the vendors. Had the price been tendered at the proper time and accepted, the interest that should have been earned would have been a gain to the vendors. Alternatively the moneys might have been invested in other lands at the current market value in 1962 which would have made up for the bad bargain which the vendors made in 1961. It is common knowledge that land values in Kuala Lumpur had been steadily rising since 1961 to the present day.

For the above reasons this appeal should be allowed and the judgment of the court below set aside with costs.

Gill and Ali F.JJ. concurred.

Appeal allowed.

Solicitors: *R. R. Chelliah Bros.; Ng Ek Teong & Partners.*

SUNGEI BIAK TIN MINES LTD. v. SAW CHOO THENG & ANOR.

[F.C. (Ong C.J. (Malaya), Gill & Ali F.JJ.) December 9, 1969]

[Kuala Lumpur — Federal Court Civil Appeal No. X-81 of 1969]

Mining — Mining land — Working mining land in skilful and workmanlike manner — Using land for purposes other than mining — Whether breach of condition to work land in skilful and workmanlike manner — Mining Enactment (F.M.S. Cap. 147), ss. 14, 16(vii) & 97 — Schedule X, clause 4.

In this case the sublessors of mining land applied for cancellation of a sublease on the ground of breach of a condition thereof. It was alleged that tapioca had been planted in 60 acres of the mining land either by the sublessees or with their connivance. Evidence adduced at the trial showed that the sublessees had carried on mining operations on the land satisfactorily. Section 97 (ii) (b) of the Mining Enactment gives power to a Senior Inspector of Mines to cancel a sublease upon proof to his satisfaction that the sublessee has not worked the land in accordance with clause 4 of the sublease in the form in Schedule X; and clause 4 provides that the sublessee shall work the said land in an orderly and skilful and workmanlike manner and subject to the provisions of the Mining Enactment. The learned trial judge held that the sublessees had been in breach of section 16 (vii) of the Enactment as the planting of tapioca on the land could not be said to be user of the land for mining or purposes ancillary to mining; and therefore the sublease was liable to cancellation.

Held, allowing the appeal: (1) the evidence showed that the sublessees had worked the land with creditable results and in compliance with the mining regulations and the terms and conditions of their sublease;

(2) their infringement of section 16 (vii) of the Mining Enactment by the user of part of the land for planting tapioca did not affect their mining operations elsewhere upon the subleased land and did not entail the cancellation of the sublease.

Cases referred to:-

(1) *Griffiths* v. *J.P. Harrison (Watford) Ltd.* [1962] 2 W.L.R. 909, 915.

(2) *Hardwick Game Farm* v. *Suffolk Agricultural Poultry Producers Association* [1966] 1 W.L.R. 287, 304, 310, 324.

FEDERAL COURT.

Lim Ewe Hock (*Lim Kean Chye* with him) for the appellants.

Peter Mooney for the respondents.

Cur. Adv. Vult.

Ong C.J.: This appeal raises for the first time the proper interpretation of clause 4 in the statutory form of mining sub-lease, as prescribed by Schedule X of the Mining Enactment (Cap. 147), which provides —

"4. That the sub-lessee shall work the said land in an orderly, skilful and workmanlike manner and subject to the provisions of the Mining Enactment and shall be liable to indemnify the sub-lessor for any expenses which he may incur, whether as fine inflicted on him or otherwise, on account of any breach of this condition by the sub-lessee."

The action arose out of an application made originally in the court of the senior inspector of mines — which was transferred for adjudication to the High Court in Ipoh at the instance of the sublessors — for cancellation of a sublease on the ground of breach of a condition thereof by the sublessees. The breach complained of lay in the planting of tapioca on 60 acres of the mining land, either by the sublessees or with their connivance, which the sublessors claimed was such contravention of the Mining Enactment as rendered the sublease liable to cancellation in accordance with an express condition therein.

The facts may be set out in a few words, since the findings of the trial judge are not challenged in this appeal. The sublessors, now respondents, had, on August 7, 1965 subleased approximately 188 acres of mining land to the appellants. Part of the land, comprised in Lots 2312 and 2311, was under young rubber still not ripe for tapping. While carrying on mining operations elsewhere on the subleased land, the appellants caused or permitted the felling of about 60 acres of this rubber for the planting of tapioca, without the respondents' knowledge or consent. This occurred between September 1967 and February 1968. Complaint was first made to the senior inspector of mines on

June 17, 1968, followed by an application to the mines court on July 16, 1968 for cancellation of the sublease. The statement of claim was filed in the High Court on November 16, 1968 and judgment given for cancellation of the sublease on July 17, 1969. Evidence adduced at the trial showed that the total value of tin-ore won in 1967 by the appellants' mining operations was $1,297,826.71, on which the tribute paid to the respondents, at the rate of 15 per cent, was $192,638.74. The total value of tin-ore won in 1968 was $1,071,644. The gross profits from the tapioca crop — without allowing for expenses incurred — which the appellants would have stood to gain by their default was, according to conflicting estimates, as high as $72,000 or as low as $24,000. In the judge's view, even the lesser figure was "not inconsiderable".

The question which now falls to be determined is whether the user of the land for tapioca constituted such a breach of clause 4 of the sublease as entitled the respondents to its cancellation. This clause consisted of two paragraphs: (a), which is not to be found in clause 4 of Schedule X, and (b), which followed the form in the Schedule, with the addition of the following words "or any of the express conditions contained in the said mining certificates or mining leases to be issued in place thereof". For present purposes, however, the departure from the prescribed form is wholly irrelevant and immaterial. It will be necessary only to refer to clause 4 in the Schedule as quoted at the beginning of this judgment.

Under section 97 (ii) (b) of the Mining Enactment "the senior inspector shall have power in his discretion to cancel a sublease upon proof to his satisfaction that the sublessee has not worked the land in accordance with clause 4 of the sublease in Schedule X, or has by his default rendered the land liable to forfeiture under this Enactment."

Here it may be observed that there is a distinction between cancellation of a sublease — which would be at the instance of the sublessor — and its forfeiture. In the latter case, action is taken to that effect by the State, in accordance with provisions laid down by section 22. The penalty of forfeiture, however, is provided expressly for breach or non-observance of certain specified covenants or conditions only, as set out in three sub-sections of section 16, none of which, it was conceded, had been broken.

The alleged breach or default, which the respondents managed to prove and on which they founded their right to cancellation, was in respect of sub-section (vii) of section 16, setting out a condition which "shall be implied in every mining lease in the absence of any express condition to the contrary", namely —

"(vii) That the lessee will not use or permit to be used any portion of the land for any purpose other than those mentioned in section 14 without the written authority of the collector."

The permitted user referred to above may be described as ancillary to mining, namely, the use of "such portions of the land as may be required for the purpose of erecting such .... buildings, or of growing such plants and vegetables or of keeping such animals or poultry, as may in the opinion of the senior inspector of mines be reasonable for the purposes of the mine or for the use of the labourers": see section 14 (iii).

Under this clause 12 of the sublease it was provided that the same shall be liable to cancellation at any time at the discretion of the senior inspector of mines or the court upon proof, *inter alia* of a breach of clause 4 in Schedule X, reproduced *verbatim*.

In the view of the learned trial judge, the agricultural user of mining land, other than under the saving provisions of section 14 (iii), constituted a breach of the implied condition stated in section 16 (vii). The planting of 60 acres of tapioca could not reasonably be considered as within the contemplation of that sub-section. Thus it only remained for him to determine the question of law whether or not the sublessees rendered themselves liable to cancellation of their sublease. The conclusion he came to is best expressed in his own words:

"It seems to me that on a proper interpretation, section 97 (ii) (b) is in two limbs which are not together cumulative but disjunctive. In my view the language is sufficiently clear as to admit of no other interpretation. Where a sub-lessee has not worked the land in accordance with clause 4 of the sub-lease in Schedule X, in the words of this clause, in an orderly, skilful and workmanlike manner and subject to the provisions of the Mining Enactment, he renders himself liable to a cancellation of his sub-lease, even though his breach, being neither of conditions (i) nor (iii), nor (v) of section 16, did not render the land liable to forfeiture under the Enactment. *Ex hypothesi*, forfeiture of the land is at the instance of the Government, whereas cancellation of the sub-lease is generally on the application of the lessee. Where, therefore, a sub-lessee is in breach of any of the other conditions, he was liable to a fine under section 120, but he also puts himself into a position whereby his sublease can be cancelled and he will find himself in this position when, by reason of his breach, the lessee applies for a cancellation.

"In this case, the sublessees had been in breach of section 16 (vii), since the planting of tapioca by them or by their licensee could not be said to be in the exercise of the right given in section 14 (iii).... It follows, therefore, that a user not otherwise permitted could not be said to be in accordance with the provisions of the Mining Enactment. It further follows that the sub-lessees, whether they had planted the tapioca or had permitted the planting, were in breach of section 16 (vii) and therefore caught by the first limb of section 97 (ii) (b) and they had thereby, as claimed by the plaintiffs, rendered themselves liable to a cancellation of their sub-lease, at the instance of the plaintiffs."

The question before this court is whether the words of clause 4 in Schedule X are rightly applied to the facts of this case. To this end I derive inspiration from the following *dicta* in the judgment of Lord Reid in *Griffiths* v. *J. P. Harrison (Watford) Ltd.*[1]

"Any decision by any court or other tribunal whether the words of an Act apply to the facts of a particular case must, unless the matter is concluded by authority, ultimately depend on its knowledge of the usage of the English language in ordinary affairs of the kind with which the particular Act is concerned. The court or tribunal may be assisted by legal principles or by so-called rules of construction, but these cannot solve the question. The question whether the words of an Act apply to particular facts is generally called a question of law. But to my mind it is in reality neither a question of law nor a question of fact. It cannot be solved either by the application of legal principles or by evidence. A court or tribunal could no doubt proceed by first translating the

words of the Act into other words (whether or not those other words be called the 'meaning' of the words of the Act) and then seeing whether those other words apply to the particular facts. But we have been warned time and again that it is dangerous and wrong to proceed in that way. The question is whether the words of the Act apply to the facts of the case."

The two limbs of section 79 (ii) (b) which are said to be disjunctive lie within the first half of paragraph (b), since the latter half concerns liability to forfeiture which admittedly has no application. The dichotomy, therefore, requires that clause 4 be paraphrased thus: (a) that the sublessee shall work the said land in an orderly, skilful and workmanlike manner and (b) that he shall work the said land subject to the provisions of the Mining Enactment. The common factor in both parts is, nevertheless, the working of the said land.

We have thus approached the crux of the matter, involving an exercise in semantics. What does "working the land" mean? Mr. Lim Ewe Hock, on behalf of the appellants, submits that, if construed, as it must be, in the context of the Mining Enactment, "working" any mining land means "getting or winning ore from the land" or "carrying out mining operations" thereon, but cannot be held to include generally any form of "user of the land" — which was undoubtedly the view taken by the judge. His contention, in other words, is that user of the land for agricultural purposes is not such working of the land as would bring it within the purview of the word "work" in the context of section 97 (ii) (b) — unless the words "use" and "work" are to be treated as synonymous in relation to mining land; user of such land in contravention of section 16 (vii) does not necessarily connote a breach of section 97 (ii) (b).

Mr. Mooney, on the other hand, submits that "working the land", in its ordinary and natural meaning, is wide enough to cover its tilling and cultivation. Throughout the Enactment, he points out, a distinction appears to have been drawn between "land" and "mine", but in both section 97 (ii) (b) and clause 4, the term used is "working the land", and not "working the mine"; consequently the obligation set out in clause 4 should apply to the land and not merely to the mine; "work", according to the *Oxford* English Dictionary, means "bestow labour upon" and planting of tapioca upon or tilling of land is certainly working it.

With respect I incline to the view that the dictionary meaning is only to be used with caution. Indeed, when I was referred to the 12th definition of "work" on page 2449 of the *Oxford* English Dictionary, I find that it means —

"To bestow labour or effort upon; to operate upon: *esp. a.* to till, cultivate (land) *OE. b.* To get (stone or slate from a quarry, ore or coal from a mine, etc.) by labour; also with a quarry, etc. as obj. *ME.*..."

The dictionary meaning is thus equally applicable to the working of a land by a farmer or a miner. While on this point, it will not be out of place to quote Professor W. A. Wilson, whose article "Questions of Degree" appeared recently in *The Modern Law Review* (1969, vol. 32, at p. 371):

"Any word has a field of possible application, a range of things, events or situations to which it *might* conceivably apply. This range can be ordered to some extent. Some of the cases are certainly covered by the word; some are marginal; some could be covered by the word only by a violent stretching of the natural use of language. The judge's task is to select the point in the order at which the line is to be drawn."

Similar difficulties have often arisen in the homeland of the English language: see again *Griffiths'* case[1] where Lord Denning said (on page 920):

"Try as you will, the word 'trade' is one of those common English words which do not lend themselves readily to definition, but which all of us think we understand well enough. We can recognise a 'trade' when we see it, and also an 'adventure in the nature of trade'. But we are hard pressed to define it."

In *Hardwick Game Farm* v. *Suffolk Agricultural Poultry Producers Association*[2] one of the issues was whether, under the Fertilisers and Feeding Stuffs Act 1926, pheasants and partridges were "poultry" within the meaning of section 2 (2) of the Act. In the view of Sellers L.J., agreeing with Havers J. —

"Unlike 'cattle', there is no definition of 'poultry' in the Act. In the light of all the argument in this case 'poultry' cannot have been left undefined because what it embraced was regarded as clear and beyond doubt. It might perhaps be said that 'poultry' in some usage is to be contrasted with game. Pheasants and partridges are clearly game in that they are shot for sport and frequently bred and preserved to be shot for sport. They have, however, this in common with poultry, that they are both used for human consumption, and it is for the ultimate preservation for food for human consumption that the legislation has sought to protect the rearing of cattle and poultry in the manner of the Act of 1926."

Davies L.J., however, thought otherwise —

"No ordinary person would, in my view, consider that pheasants and partridges are or would be included in the word 'poultry'. In common parlance there is a marked distinction between 'poultry' and 'game'."

Diplock L.J., who shared the same view, said:

"'Poultry' is a common English word. There is nothing in the statute to indicate that it should be construed in anything but its ordinary sense and this is for the court to decide. I do not think that the ordinary educated Englishman would call pheasants 'poultry'."

With respect, I would adopt what fell from Lord Reid as well as the majority in the case just cited. The Enactment was one passed to amend and consolidate the law relating to mining and its definition section states that —

"'mining land' or 'land' means land comprised in a mining lease or mining certificate."

Section 16 (vii) accordingly prohibits, in effect, any user of mining land, or any portion thereof, for purposes other than those mentioned in section 14, without the written authority of the collector. The judge's finding of fact in this respect goes unchallenged, as it must. By section 18 "the implied covenants and conditions specified in section 16 ... shall continue binding on the lessee notwithstanding that he may have subleased the land or any part thereof". Consequently, section 120, which provides specific penalties for infringing conditions of title, apply — by way of fine — for wrongful user of land. This point was made by the judge in his judgment.

In contra distinction to user, however, section 97 (ii) (b) provides the sub-lessor with the remedy of cancellation "where the sub-lessee has not worked the land in accordance with clause 4 of the sub-lease in Schedule X."

Reverting to the majority view expressed in the *Hardwick Game Farm* case, I think I am on safe ground in holding that, in common parlance, "user" of land means its user in general terms, including user for the specific purposes described in sub-sections (i) to (iv) of section 14; whereas, again in common parlance, "working" mining land should be given a more restricted meaning as confined to mining operations and ancillary activities.

If this is the true view, as I think it is, it follows that clause 4 of Schedule X — whether dichotomous, as the learned judge construed it, or otherwise — confers cancellation powers on the senior inspector of mines, or the court in his place, only where the sub-lessee's liability thereto arises by reason of his default in working the land either "in an orderly, skilful and workmanlike manner" or default in working it "subject to the provisions of the Mining Enactment". In either case, "work" relates primarily to mining — certainly not agricultural user. In the words of Lord Reid then, I would apply this criterion: as far as my knowledge of usage of the English language extends to its application to the ordinary affairs of miners, I think a miner "works" land when he mines it. When he uses it for some other purpose he does not do so *qua* miner — as the facts clearly show in this case. Consequential on this view, and again following their Lordships of the courts in England, I would hold that, when clause 4 speaks of the sub-lessee working the land "subject to the provisions of the Mining Enactment," the provisions understood as so referred to would, in common parlance, be those set out in considerable detail under the heading of *Regulation of Mining Operations* in Part IX of the Enactment, sections 77 to 94.

While on the subject of the wording of clause 4 and its application to the facts of this case, it is significant to observe that the sub-lessees — insofar as the primary object and purpose of the sublease is concerned, as well as the primary interests of sublessors — were to all intents and purposes devoting their undivided attention to the task of mining, with creditable results and strictly in compliance with mining regulations and the terms and conditions of their sublease. That they erred by an infringement of section 16 (vii) alone, in no way, even remotely, affected their mining operations elsewhere upon the sub-leased land. The penalty for infringement of section 16 (vii) is expressly provided: it does not include cancellation of a sublease. For the latter remedy the respondents had to rely on clause 12 of the sublease which merely was a reproduction of section 97 (ii) (b), which in turn falls back on clause 4 of Schedule X. For the reasons above stated it is my view that an infringement of section 16 (vii) does not in law constitute a breach of clause 4. There is consequently no call for the exercise of discretion: on this point I think any expression of my views would be supererogatory.

With all respect I am unable to agree with the conclusion of the learned trial judge. I would allow this appeal with costs. As to the costs in the court below, I have no doubt that, even had the appellants been wholly successful there, the learned trial judge would have felt obliged, in the circumstances, to refuse them their taxed costs of the action in full. This is abundantly clear from his judgment and in my view he would be right to do so. I would therefore order that the appellants costs in the court below be allowed at 50 per cent of the amount taxed.

Gill and Ali F.JJ. concurred.

Appeal allowed.

Solicitors: *Lim Cheng Ean & Co.; Skrine & Co.*

HAMIDON BIN AHMAD v. COLLECTOR OF LAND REVENUE, JASIN

[O.C.J. (Sharma J.) December 19, 1969]

[Malacca — Land Reference No. 34 of 1962]

Land Laws — Land acquisition — Applicant not served with notice of acquisition of land — No claim to collector — Whether applicant can object to award — Whether court has jurisdiction — Land Acquisition Act, 1960, ss. 37 (2) & 38 (5).

In this case the government acquired land in the Mukim of Sungei Rambai, Malacca, including land belonging to the applicant. Notice of acquisition could not be sent to the applicant as he was not resident within the State of Malacca. The Collector of Land Revenue made an *ex parte* award of $280. The applicant subsequently made an objection and the collector referred the matter to the court. When the matter came on for hearing the Legal Adviser submitted that the reference was not maintainable on the following grounds: (1) the applicant not having made any claim before the collector is not a person entitled to object as contemplated by section 37(1) of the Act; (2) the court has no jurisdiction to hear the reference because the pre-requisite of a valid objection was not that the collector's award alone should not be accepted but in addition the claim should be made to the collector "in due time"; (3) the mere fact that the collector has made reference under section 38(5) of the Act is no criterion that there is jurisdiction in the court to hear such a reference; (4) as the *ex parte* award by the collector was only for $280, this was final under section 37(2) of the Act.

Held: (1) a person who is not present before the collector at the time of making the award and does not accept the award can make an objection to the award and he may under section 38(3)(b) of the Land Acquisition Act, 1960, make the objection within 6 months of the date of the award;

(2) the court had jurisdiction to hear the reference in this case, as an objection had been made in due time;

(3) as the amount claimed by the applicant in this case is in excess of $500, the collector's award was not final under section 37(2) of the Land Acquisition Act, 1960.

Cases referred to:-

(1) *Amritrav Krishna Deshpande* v. *Balakrishna Ganesh Arampurkar* (1887) I.L.R. 11 Bom. 488, 490.

(2) *The King* v. *Governor of Brixton Prison* [1937] 1 K.B. 305; [1962] 2 All E.R. 176.

(3) *Raja Harish Chandra Raj Singh* v. *The Deputy Land Acquisition Officer & Anor.* [1962] 1 S.C.R. 676, 681-4.

(4) *Ezra* v. *The Secretary of State* (1903) I.L.R. 30 Cal. 36, 86.